

Case No. 2013-1603

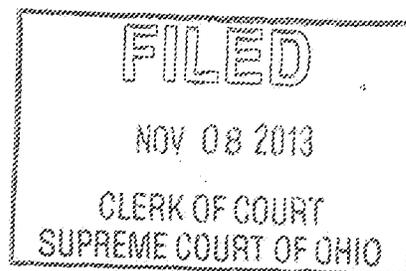
In The Supreme Court of Ohio

Appeal from the Court of Appeals
Fifth Appellate District
Stark County, Ohio
Case No. 2013CA00044

ANA M. HAMBUECHEN,
Respondent-Appellant,

v.

221 MARKET NORTH, INC. DBA
NAPOLI'S ITALIAN EATERY,
Petitioner-Appellee.



Memorandum Opposing Jurisdiction of Appellee, 221 Market North, Inc. dba Napoli's Eatery

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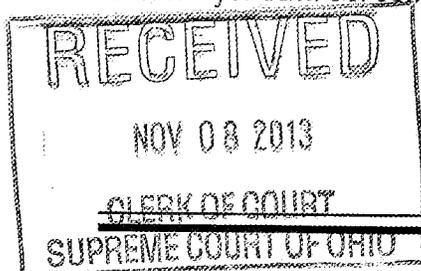


Table of Contents

This is Not a Case of Great Public or General Interest.1
Statement of the Case and Facts.5
Law and Argument.7
Response to the Appellant’s Proposition of Law.7

Because the Rules of Civil Procedure apply to an appeal from a finding of the Ohio Civil Rights Commission, an appeal is commenced if service is obtained within one year, according to Civil Rules 3 and 4.

Conclusion.14
Certificate of Service.15

Appendix

Opinion of the Fifth Appellate District (August 26, 2013). A-1
Judgment entry of the Fifth Appellate District (August 26, 2013). A-8

This is Not a Case of Great Public or General Interest

The appellant Ohio Civil Rights Commission asks this Court to exercise its discretionary jurisdiction simply because the Commission is dissatisfied with the Fifth Appellate District's decision to rely on several of Ohio's appellate districts that have held that Ohio's Civil Rules apply to the timing of service of appeals from the Commission's orders. Though it claims this is an issue that Ohio's courts decide with inconsistent results, that is not accurate. To the contrary, this is an issue that has neither troubled Ohio's courts nor confused its litigants. Therefore, this Court should decline to review this case.

This case began when Ana Hambuechen filed a discrimination charge with the Commission alleging that the appellee Napoli's fired her because she was pregnant. The Commission charged Napoli's with a violation of R.C. 4112.02(A), and an administrative law judge recommended that the Commission find that Napoli's violated that section. When the Commission agreed, Napoli's appealed to the Stark County Court of Common Pleas.

Napoli's filed its appeal within the 30-day requirement—which the Commission does not dispute. Napoli's, however, did not *serve* its appeal through the clerk within 30 days. It did so a few days later.

But the Commission swooped in and asked the court to dismiss Napoli's appeal for failing to initiate service through the clerk within 30 days of the Commission's order. Napoli's countered that it did not need to do so, it only

needed to *file* its appeal within 30 days, then *serve* it within one year in accordance with Civil Rules 3 and 4.

The trial court agreed with the Commission, but the Fifth District agreed with Napoli's, holding that R.C. 4112.06 "provides only that the appeal be filed within thirty days; the statute does not clearly require that service be initiated within thirty days."¹ Further, the Fifth District found, in accordance with other Ohio courts, that service of an appeal under R.C. 4112.06 is governed by the Civil Rules, and therefore, must be served through the clerk within one year.²

The Commission now argues that this Court should review this case so that it can ostensibly reconcile conflicting decisions of Ohio's appellate districts and "bring uniformity to the law" and prevent "unequal treatment of petitions for review throughout the state." (Memorandum, p. 2). As a preliminary matter, however, if the Commission really believed that there was a conflict among Ohio's appellate districts resulting in the disparate treatment of Ohio's litigants, it certainly would have asked the Fifth District to certify a conflict in accordance with App.R. 25. Notably, it did not.

In any case, there is no confusion among Ohio's courts. To be sure, there are no Ohio cases directly on point; in other words, no Ohio court (until the Fifth District in this case) has considered the specific issue of whether an appeal

¹ *Hambuechen v. 221 Market North, Inc.*, 5th Dist. No. 2013CA00044, 2012-Ohio-3717, ¶ 15.

² *Id.* at ¶¶ 12-14.

under R.C. 4112 must be not only filed, but served within 30 days, or whether the Civil Rules allow an appellant a year to complete service. That was the Fifth District's observation as well: "None of the cases cited by the parties directly address the issue before this Court."³

Still, the foundation of the Fifth District's decision was squarely based on a proposition with which Ohio's courts unanimously agree: that the Rules of Civil Procedure apply to an appeal under R.C. 4112.06 because that section is silent regarding the timing of service of the appeal. Contrary to the Commission's claim, none of the cases that supposedly conflict with the Fifth District's decision actually do so.

The Fifth District's decision did nothing more than predictably apply a well-accepted proposition of law. In short, there already is sufficient clarity on this issue, even if the Commission does not choose to recognize it.

The Commission also tosses in a policy argument to prop up its claim that this Court should devote its limited time and resources to consider this case. Specifically, it claims that, "If a party has a full year to initiate service, the Commission is stuck in limbo while it waits to see if an appeal is properly taken." (Memorandum, p. 3) This is equal parts inaccurate and melodramatic. It is inaccurate because the Commission only needs to wait 30 days to see if an appeal is filed. After all, even the Commission admits that the Fifth District

³ *Id.* at ¶ 12.

“acknowledged the 30-day deadline to *file* the appeal...” (Memorandum, p. 1)

So the Commission only needs to wait 30 days, not one year, to see if an appeal is taken—hardly what could be described as “limbo.” Moreover, the Commission’s claim is exaggerated because an appellant being allowed a year to perfect service puts the appellee in no worse position than every other civil litigant, who are likewise governed by the one-year requirement in Civil Rules 3 and 4.

Here, the Commission did not have to wait very long since Napoli’s filed its appeal within eleven days of the Commission’s order and initiated service only a few weeks after that. The Commission was hardly languishing in a fog of suspense and confusion when it rushed to dismiss Napoli’s appeal barely a month after it was filed. It was lying in wait.

Additionally, the Commission’s “limbo” argument is certainly ironic. After all, it was Napoli’s that waited almost *two and one-half years* for the Commission to even agree with the ALJ’s recommendation. If either party was in “limbo” in this case, it was Napoli’s, not the Commission. In short, there is little substance to the Commission’s policy argument.

For these reasons, this Court should decline to exercise its discretionary review in this case.

Statement of the Case and Facts

In 2007, Ana Hambuechen filed a charge with the appellant Ohio Civil Rights Commission (Commission) alleging that the appellee 221 Market North, Inc., known as Napoli's Italian Eatery (Napoli's), fired her because she was pregnant. The Commission issued a complaint charging Napoli's with violating R.C. 4112.02(A). Napoli's denied the allegations and the case proceeded to trial in front of an administrative law judge ("ALJ") in November 2008.

Several years later, in April 2012, the ALJ recommended that the Commission find that Napoli's violated R.C. 4112.02(A). The Commission did so in its order dated November 15, 2012.

Eleven days later, on November 26, 2012, Napoli's filed a petition for judicial review in the Stark County Court of Common pleas under R.C. 4112.06. At first, Napoli's attorney served the petition on the Commission and Ms. Hambuechen through regular mail, and not through the clerk of courts.

On December 28, 2012, barely a month after Napoli's filed its petition, the Commission asked the court to dismiss it for lack of subject matter jurisdiction, arguing that Napoli's had to do more than file its petition within 30 days of the Commission's Order, it had to also initiate service through the clerk of courts within that time.

On December 31, 2012, Napoli's did two things. First, it responded to the Commission's motion, pointing out that service of petitions under R.C. 4112.06 is to be accomplished in accordance with the Ohio Civil Rules, including, in

particular, Civ.R. 3(A), which provides that a “civil action is commenced by filing a complaint with the court if service is obtained within one year.” Second, Napoli’s filed a praecipe for service to the clerk of courts for service of the petition in accordance with the Civil Rules. In other words, Napoli’s requested service through the clerk about 35 days after it filed its petition.

Still, the court dismissed Napoli’s petition for lack of subject matter jurisdiction because it “did not property [sic] initiate service of its Petition on the Commission and Complainant through the Clerk of Courts within 30 days of the Commission’s Final Order....”⁴

But the Fifth Appellate District correctly reversed the trial court’s decision in an entry filed on August 26, 2013. In accordance with several Ohio cases, the Fifth District observed that although R.C. 4112.06 requires an appeal be instituted within 30 days, the statute “is silent” as to how service is to be made.⁵ As such, Ohio’s courts have held that, in the absence of a good reason not to apply them, the Civil Rules apply to the commencement and service of a petition filed pursuant to R.C. 4112.06. Therefore, the Fifth District held that the petition for judicial review must be filed within thirty days, but has a year to “commence” the action in accordance with Civil Rules 3 and 4.⁶

The Commission now seeks this Court’s discretionary review.

⁴ Appendix (“Apx.”) at A-4.

⁵ *Hambuechen*, 5th Dist. No. 2013-CA-00044, 2013-Ohio-3717 at ¶ 13.

⁶ *Id.* at ¶¶ 13–15.

Law and Argument

Response to First Proposition of Law

Because the Rules of Civil Procedure apply to an appeal from a finding of the Ohio Civil Rights Commission, an appeal is commenced if service is obtained within one year, according to Civil Rules 3 and 4.

According to R.C. 4112.06, any party may appeal a finding of the Commission in the court of common pleas in the county where the alleged unlawful discriminatory practice occurred. Section (B) provides: “Such proceedings shall be initiated by the filing of a petition in court...and the service of a copy of the said petition upon the commission and upon all parties who appeared before the commission.” In *Ramsdell v. Ohio Civ. Rights Com’n*, this Court held that R.C. 4112.06(H) requires that an appeal be filed within 30 days of the service of the Commission’s order.⁷

The Commission does not dispute—nor can it—that Napoli’s filed its appeal within 30 days of the order. In fact, Napoli’s did so within 11 days.

Instead, the dispute is when an appeal must be served. After all, the statute does not specify how service is to be made.⁸ The Commission claims an appellant must initiate service within 30 days of the Commission’s order, while Napoli’s and the Fifth District believe that the petition must be served within one year in accordance with the Civil Rules.

⁷ 56 Ohio St.3d 24, 25, 563 N.E.2d 285 (1990).

⁸ *City of Cleveland v. Ohio Civil Rights Com’n*, 43 Ohio App.3d 153, 156, 540 N.E.2d 278 (8th Dist.1988).

But Ohio’s courts have already resolved this issue, which did not seem to present too much difficulty for Ohio’s litigants—until now, at least. Ohio’s courts have determined that unless there is a good reason not to apply them, the “Rules of Civil Procedure apply to an action commenced in common pleas court pursuant to R.C. 4112.06.”⁹ This includes Civ.R. 3(A) and Civ.R. 4(A) and (B).¹⁰ Those rules require service through the clerk of courts.¹¹

In addition, the Civil Rules also require service to be accomplished within *one year*: Civ.R. 3(A) provides that a “civil action is commenced by filing a complaint with the court if *service is obtained within one year*.”¹² (Emphasis added.) The court in *Donn*—which also involved a petition filed under R.C. 4112.06—observed: “Civ.R. 3 and 4 further provide that a civil action is commenced by the filing of a complaint with the court and service upon the defendant through the clerk of courts within one year of filing.”¹³

The Eighth District’s holding in *City of Cleveland v. Ohio Civil Rights Com’n* supports the Fifth District’s holding.¹⁴ That case considered an appeal

⁹ *Id.*; see also, *Abbyshire Const. Co. v. Civil Rights Comm.*, 39 Ohio App.2d 125, 316 N.E.2d 893.

¹⁰ *Id.*; *Donn, Inc. v. Ohio Civil Rights Com’n*, 68 Ohio App.3d 561, 565, 589 N.E.2d 110 (8th Dist.1991).

¹¹ *City of Cleveland*, 43 Ohio App.3d at 158, 540 N.E.2d 278.

¹² *Id.* at 157.

¹³ *Donn, Inc.* at 565.

¹⁴ 43 Ohio App.3d at 153–154, 540 N.E.2d 278.

from the Commission's determination that Cleveland discriminated against an employee based on a physical handicap. Just as in this case, Cleveland served the petition through ordinary mail; but unlike this case, never attempted to do so through the clerk within one year. So, more than a year after Cleveland filed its appeal, the complainant asked the court to dismiss the case because Cleveland failed to serve him within one year as required by Civ.R. 3(A) and 4(A). The court did so.

On appeal to the Eighth District, Cleveland argued that the Civil Rules governing service did not apply to R.C. 4112.06 appeals. As such, Cleveland argued it did not need to serve the petition through the clerk, or, by implication, do so within one year of the Commission's order. The court described the issue as "whether Civ.R. 3(A), 4(A) and 4(B) are applicable" to the parties to a R.C. 4112.06 appeal.¹⁵ The court held that they were, and that those rules required service through the clerk of courts.¹⁶ And because Cleveland did not do so *within one year* the court held that its petition had to be dismissed.¹⁷

The Eighth District reached a similar result in *Donn, Inc. v. Ohio Civil Rights Com'n.*¹⁸ There, the court considered a R.C. 4112.06 appeal from the

¹⁵ *Id.* at 155.

¹⁶ *Id.* at 158.

¹⁷ *Id.* at 157–158;

¹⁸ 68 Ohio App.3d 561; 589 N.E.2d 110 (8th Dist.1991).

Commission's decision that a company illegally discriminated against one of its employees. But the company never served the employee, who did not even receive a copy of it for more than a year and a half following the company's appeal. The court dismissed the company's appeal based on its decision in the *City of Cleveland* case.¹⁹

The company appealed and argued the *City of Cleveland* case did not apply. The Eighth District disagreed and affirmed its holding in *Cleveland*, holding that "This court has held that an action for judicial review pursuant to R.C. 4112.06 may be commenced only by proper service through the clerk of courts in accordance with Civ.R. 3 and 4...[which] further provide that a civil action is commenced by the filing of a complaint with the court and service upon the defendant through the clerk of courts *within one year of filing*."²⁰ And because the company did not, the court held that dismissal was the appropriate remedy.²¹

Still, the Commission claims that service must be commenced within 30 days. The Commission's position, however, is based on a misreading of the cases upon which it relies.

¹⁹ *Id.* at 564.

²⁰ (Emphasis added.) *Donn, Inc.*, 68 Ohio App.3d at 565, 589 N.E.2d 110.

²¹ *Id.*

For example, the Commission relies heavily upon this Court's decision in *Ramsdell v. Ohio Civ. Rights Comm'n.*²² But the Commission's reliance on that case is entirely misplaced. In *Ramsdell*, the claimant filed a petition for review 31 days after the Commission denied her charge of discrimination. When the trial court dismissed her petition as untimely, she argued to this Court that the "thirty-day period for filing a petition for judicial review of a commission order is not mandatory."²³ This Court disagreed, holding that the 30-day time limit was, in fact, mandatory, reasoning that if it was not, a party seeking review would "be free to do so at any time," which, this Court noted, could be "months or even years" later.²⁴

Having decided that R.C. 4112.06 imposes a mandatory 30-day time limit for filing an appeal from a Commission order, this Court then addressed when that time begins. Because the Commission mailed the order, the appellant argued he had three additional days to file his appeal under Civ.R. 6(E). The court disagreed, holding that the Civil Rules "may not be applied to extend or reactivate jurisdiction," which was limited to 30 days.²⁵ That was the extent of this Court's holdings in *Ramsdell*.

²² 56 Ohio St.3d 24, 563 N.E.2d 285 (1990).

²³ *Id.*

²⁴ *Id.* at 25.

²⁵ *Id.* at 27–28.

Ramsdell does not help the Commission here because there is no dispute that Napoli's filed its appeal within 30 days, and did not seek to use the Civil Rules to "extend" or "reactivate" the court's jurisdiction. Moreover, *Ramsdell* had nothing to do with the timing of service of an appeal—the only issue in this case. That was the Fifth District's conclusion as well, finding that *Ramsdell* "did not address the applicability of the Civil Rules to service of a petition filed pursuant to R.C. 4112.06."²⁶ The Fifth District was certainly correct, *Ramsdell* does not help the Commission here.

Next, the Commission relies on the Eighth District's decision in *Muhammad v. Ohio Civ. Rights Comm'n.*²⁷ But that case does not help the Commission either. In that case, the court dismissed Muhammad's appeal from the Commission's finding of "no probable cause" because he failed to even name and serve the employer, obviously a party to the action in the Commission.²⁸ The appellant in that case never even argued that he had a year to complete service.

Finally, the Commission relies on *Ramudit v. Fifth Third Bank*. There, the Commission found that it was "not probable" that a bank unlawfully disciplined an employee based on her national origin. The employee filed a

²⁶ *Hambuechen*, 2013-Ohio-3717, ¶ 15.

²⁷ 8th Dist. No. 99327, 2013-Ohio-3730.

²⁸ *Id.*

petition under R.C. 4112.06 but never served the Commission.²⁹ The court held that the petition “was not properly initiated through filing an and proper service within thirty days as required by R.C. 4112.06(H)....”³⁰

However, the issue in the case was not the time within which a petition must be filed. The only relevant fact was that the Commission was never served at all, not whether they were served on time. The court therefore did not decide the issue regarding timing of service, so it is of no relevance to the facts in this case and the Commission’s reliance on *Ramudit* is likewise misplaced.

Contrary to the Commission’s argument, none of the cases upon which it relies holds that service of a petition under R.C. 4112.06 must be initiated within 30 days. To the contrary, the *Cleveland* and *Donn* cases explicitly provide that Civ.R. 3 and 4 apply and that Napoli’s need only serve the Commission within one year of the order.

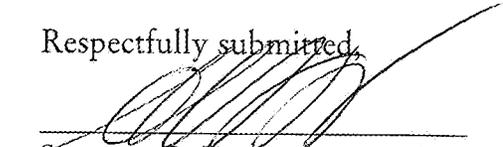
²⁹ *Id.* at ¶¶ 1–3.

³⁰ *Id.* at ¶ 11.

Conclusion

For these reasons, Napoli's requests that this Court decline to exercise its discretionary review in this case.

Respectfully submitted,



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Certificate of Service

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